90-442

Supreme Court, U.S.
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NO.

IN THE
Supreme Court of the United States
October Term, 1990

ALBERT PONTANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a jury must be given special interrogatories where a charge of engaging in a continuous criminal enterprise is submitted for their consideration.

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OPINIONS BELOW

The opinion of the Court of Appeals is unpublished but is reproduced in the appendix to the petition in this case.

JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C.1254(1).

STATEMENT

A. Background

On February 17, 1988, a federal grand jury returned an indictment against Albert Pontani and five other individuals. Count One charged Pontani and one other defendant, Daniel Marino with engaging in a continuing criminal enterprise in violation of 21 U.S.C.§848. In addi-

tion, the defendants were charged with various violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.§§841(a), 846. Pontani and some of the other defendants also were charged with several counts related to extortionate loans.

Five of the six defendants indicted were tried before a jury between September 26, 1988 and November 10, 1988, when the jury returned its verdicts finding all defendants guilty on all counts except that the jury found one defendant not guilty as to one count. Sentencing took place on January 10, 1989 and petitioner was sentenced to a term of thirty (30) years' imprisonment.

B. Statement of Facts

In Count I of the indictment, petitioner Pontani and Daniel Marino were charged with having organized, supervised, and managed a continuing criminal enterprise ("CCE"). The indictment charged that they acted in concert with at least five other persons, including three co-defendants and other persons known or unknown.

Six of the other counts charged narcotics offenses that were predicates for the CCE. Those narcotics offenses comprised three separate but related schemes, each of them allegedly supervised by Pontani and two of them also supervised by Marino: a scheme to distribute cocaine, which involved Marino, Wilson, and a cooperator named Johnson (Counts 2 through 5); a scheme involving Belardo and Muccie to obtain P2P from Santo Domingo through a cooperator named Berchielli (Count 11); and a second scheme, this time involved Marino as well as Belardo and Muccie, to obtain P2P through a cooperator named

Bramer located in New Orleans (Count 12).[1] Counts 6 through 10 charged various offenses relating to an extortionate $20,000 loan to Ronald Bramer (a/k/a Jack Diamond), who was allegedly heavily involved in the second attempt to obtain P2P.

C. The Decision of the Third Circuit Court of Appeals

The Court of Appeals summarily denied petitioner's claim that the district court committed plain error in failing to require the jury to fill out a special verdict.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES A SIGNIFICANT QUESTION OF WHETHER SPECIAL INTERROGATORIES SHOULD BE REQUIRED FOR CHARGES INVOLVING ENGAGING IN A CONTINUOUS CRIMINAL ENTERPRISE

This petitioner presents a question whether a jury must be given special interrogatories to record the precise basis for a guilty verdict where a charge of engaging in a continuing criminal enterprise is submitted for their consideration.

To establish violation of §848, the government must prove:

(1) a felony violation of the federal narcotics law;

---

1. Following the verdict, on January 9, 1989, the district court entered a judgment of acquittal on Count 12 of the indictment on the ground that there was "insufficient circumstantial evidence to prove beyond a reasonable doubt that the substance alleged in Count 12 was in fact P2P."

(2) as part of a continuing series of violations;

(3) in concert with five or more persons;

(4) for whom the defendant is an organizer or supervisor; and,

(5) for which he derives substantial income or resources.

United States v. Fernandez, 822 F.2d at 382, 385 (3d Cir. 1983).

Petitioner contends that the manner in which the case was submitted to the jury does not permit a Court to adequately review the jury's verdict. Since the jury returned a general verdict without answering special interrogatories, we have no way of determining which persons were viewed by the jury as being supervised by Pontani. This lack of specificity in the verdict form is ground for reversal because the jury may have counted among the required five persons a person as to whom the evidence was insufficient or who was involved in Count Twelve, which was ultimately dismissed by the court.

Although special verdicts have been disfavored generally in criminal cases, *United States v. Coonan,* 839 F.2d 886, 891 (2d Cir. 1988); *United States v. Spock,* 416 F.2d 165, 180-83 (1st Cir. 1968), they have commonly been used when necessary to determine the punishment that should be imposed, *see, United States v. Dennis,* 786 F.2d 1029 (11th Cir. 1986), and where the offense charged requires proof of a specific number of predicate acts and the nature of proof at trial warrants it. *See, e.g., United States v. Ruggerio,* 726 F.2d 913, 922-23 (2d Cir.), *cert. denied,* 469 U.S. 831 (1984). Consequently, if there was insuffi-

cient evidence on one of the counts, then the verdict is ambiguous and a new trial must be granted. *United States v. Natelli,* 527 F.2d 311, 325 (2d Cir. 1975), *cert. denied,* 425 U.S. 934 (1976); *see also United States v. Ruggiero.*

Here, the defense neither objected to the district court's instruction nor requested that the jury be given a special interrogatory requiring identification of the five persons on whom it agreed. However, given that the sentence was probably a *de facto* "life sentence", it effects such a fundamental liberty interest that it warrants treatment as "plain error." *See, Newman v. United States,* 817 F.2d 635, 637, n.6 (10th Cir. 1987).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Third Circut.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5042

UNITED STATES OF AMERICA

v.

JAMES WILSON,

Appellant

No. 89-5087

UNITED STATES OF AMERICA

v.

ALBERT "REDS" PONTANI,

Appellant

No. 89-5091

UNITED STATES OF AMERICA

v.

DANIEL MARINO,

Appellant

No. 89-5103

UNITED STATES OF AMERICA

v.

ANGELO BELARDO,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Nos. 88-00039-07, 01, 02, 03)

Submitted Under Third Circuit Rule 12(6)
On April 6, 1990

Before: HIGGINBOTHAM, *Chief Judge* and
COWEN and NYGAARD, *Circuit Judges*
(Opinion Filed: JUL 17 1990)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge*

Albert Pontani, Daniel Marino, Angelo Belardo and James Wilson, appellants, were convicted by a jury on November 9, 1988 for various narcotics related offenses.[1] Pontani was convicted on nine counts of the 12 count indictment, including a Continuing Criminal Enterprise (CCE) offense. Marino was convicted on seven counts, including a CCE offense. Wilson was convicted on one count of conspiracy to distribute cocaine. Belardo was convicted on one count of conspiracy to possess with intent to distribute p2p. Each appellant filed a timely appeal. We have jurisdiction pursuant to 28 U.S.C. §1291.

Appellant Wilson makes two arguments on appeal: the district court erred in failing to sever his case from his co-defendants' cases pursuant to Rule 8(b) of the Federal Rules of Criminal Procedure; and, the district court abused its discretion in failing to sever his case from his co-defendants' cases pursuant to Rule 14 of the Federal Rules of Criminal Procedure. We disagree. First, Wilson did not make a request under Rule 8(b). Second, the offense for which Wilson was indicted was a part of the series of continuing offenses alleged in the CCE count alleged against Marino and Pontani, thus a severance under Rule 8(b) was not warranted. Lastly, the district court did not abuse its discretion in denying Wilson's Rule 14 request as the evidence against him was very strong.

1. The jury originally convicted Pontani, Marino and Belardo on count 12 of the 12 count indictment, possession with intent to distribute p2p, but the district court granted their motion for judgment of acquittal on the grounds that the government failed to prove that the substance defendants possessed was actually p2p.

Appellant Belardo also makes two arguments: the district court erred in denying Belardo's motion for severance under Rule 8(b); and, the district court erred in denying Belardo's motion for a mistrial for the government's alleged failure to turn over exculpatory evidence. As in Wilson's case, the counts in the indictment against Belardo were part of the series of offenses in the CCE count against Marino and Pontani, thus a Rule 8(b) severance was not required. We also conclude that the district court did not err in denying Belardo's motion for mistrial.

Marino and Pontani[2] make several arguments on appeal. Marino first argues that the evidence failed to establish that he supervised five or more persons. He asserts that the persons indicted on count 12, who were necessary to the government's proof that Marino supervised "five or more persons," could not be included in the "five or more persons" element of a CCE because the district court acquitted those persons on count 12, and therefore, the government presented no evidence that Marino supervised five or more persons. We disagree. To convict a person of a CCE, the government need not indict the person for each violation that forms the "continuing series of violations." *See, e.g., United States v. Rosenthal,* 793 F.2d 1214 (11th Cir. 1986). Here, although the court acquitted the individuals who, through count 12, would have satisfied the five or more persons element for Marino's CCE charge, it did not in its jury charge limit the jury's consideration to that violation:

> This continuing series of offenses must be violations of the Federal drug laws like those charged in the indictment. So

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2. Both Marino and Pontani adopt the arguments of the other appellants pursuant to Rule 28(i), Fed. R. App. P.

> in order to find that a Defendant has committed a continuing series of violations, you must find beyond a reasonable doubt both that he is guilty as charged in any one or more of the counts charged, and that such is part of a continuing series of three or [more] sic violations of the Federal drug laws committed over a period of time with a single or similar purpose.

App. at 559. Thus, under the jury charge, the jury's verdict on the CCE count is supported because it could have found defendant guilty of a conspiracy to possess p2p under the fact scenario of count 12, thereby providing the violation through which the five or more person element could be satisfied. The district court's subsequent acquittal on count 12 does not undermine the integrity of the verdict on the CCE count.

Marino next argues that the "continuing" element of the CCE could not be met when there is a thirty-five month time lapse between violations. He also asserts that the "continuing" element fails because the violations were isolated and disconnected acts, not related or ongoing. We disagree. The government only needs to establish that a defendant committed three or more drug violations to satisfy the "continuing series of violations element." *See, e.g., United States v. Hernandez-Escarsega,* 886 F.2d 1560 (9th Cir. 1989). Further, the evidence, in a light most favorable to the government, establishes that the violations were related.

Marino and Pontani next argue that the government failed to establish the "substantial income" element of the CCE charge. We conclude that the amount of money established by the government to have been generated by the CCE, $70,000, is "substantial income."

Marino and Pontani first assert that "substantial income" is determined by examining only net income, that is, income after expenses. We disagree. *See United States v. Dickey,* 736 F.2d 571 (10th Cir. 1984).

They next question whether the "substantial income" element can be met when the majority of the money came from one distinct aspect of the CCE predicate offenses. We conclude that "substantial income" should be determined by the amount of money generated by the CCE as a whole and not, as suggested by appellants, by examining each aspect of the CCE.

Pontani next argues that the government failed to prove that he supervised five or more people. We disagree. Ample evidence establishes, if believed by a jury, that Pontani supervised "five or more" people. Pontani also argues that the cocaine conspiracy merely showed that he was fronting drugs on credit and that such conduct is not evidence of supervision. We have held otherwise in *United States v. Aguilar,* 843 F.2d 155 (3d Cir. 1988).[3]

---

3. Pontani and Marino make a number of arguments that we summarily reject: the district court committed plain error in failing to require the jury to fill out a special verdict indicating which of the five persons Pontani and Marino supervised; Pontani's and Marino's convictions on the other counts were prejudiced by spillover from count 12; Pontani's and Marino's 6th amendment rights were violated by the prosecutors' failure to inform the grand jury that one witness, John Johnson, a co-conspirator turned informant, was ineligible to be a co-conspirator after becoming an informant, and by the district court's failure to instruct the jury that Johnson could not be considered a co-conspirator after becoming an informant; and, the district court committed plain error by failing to instruct the jury specifically that it had to be unanimous as to which three violations constituted the "series of violations."

Lastly, Pontani and Marino argue that the district court erred in imposing separate sentences on the CCE and predicate conspiracy counts. The government concedes this error, and we agree and will remand for resentencing. *United States v. Aguilar,* 843 F.2d 735, 736-37 (3d Cir. 1988).

In sum, we will affirm the district court in all respects as to all appellants except for the sentencing of Pontani and Marino. We will vacate the sentences imposed on Pontani and Marino, and will remand for a resentencing of Pontani and Marino consistent with *Aguilar,* 843 F.2d 735.

TO THE CLERK:

Please file the foregoing not-for-publication opinion.

s/ Circuit Judge